83-2048

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NO.

in the
Supreme Court
of the
United States

Spring Term

CHESTER ZUKOWSKI, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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24pp

QUESTIONS PRESENTED FOR REVIEW

WHETHER THE TRIAL COURT ERRED IN REFUSING TO SEVER THE TRIAL OF THE INCOME TAX COUNTS FROM THE NARCOTICS CHARGES?

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE GOVERNMENT'S "SUMMARY CHART", EXHIBIT 171, INTO EVIDENCE WHERE SUCH CHART WAS INACCURATE AND PRESENTED THE MERE OPINIONS OF THE GOVERNMENT AS TO THE EVIDENCE?

LIST OF PARTIES

The caption of this cause lists all parties to this cause who are before this Court.

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OPINION BELOW

The opinion of the United States Court of Appeals, Eleventh Circuit, was entered on April 9, 1984. That opinion is set forth in Appendix A to this Petition. A timely filed Motion for Rehearing was denied on May 14, 1984. That opinion is set forth in Appendix B to this Petition.

JURISDICTION

This Petition for Certiorari was filed less than 60 days from the opinion of the lower court. The jurisdiction of this Court is invoked under 28 U.S.C., Rules 17 and 20, Supreme Court Rules. The Eleventh Circuit Court of Appeals, in this case, has rendered an opinion which is in conflict with the decision of the Second Circuit Court of Appeals in *United States v. Altruda*, 224 F.2d 935 (2d Cir. 1955), and the decisions of the Fifth Circuit Court of Appeals in *Steele v. United States*, 222 F.2d 628 (5th Cir. 1955) and *United States v. Diaz-Munoz*, 623 F.2d 1330 (5th Cir. 1980); and the decision of the Sixth Circuit Court of Appeals in *United States v. Wirsing*, 719 F.2d 859 (6th Cir. 1983).

PROVISIONS INVOLVED

The pertinent portion of the Fifth Amendment to the United States Constitution is:

No person shall . . . be deprived of life, liberty or property, without due process of law.

STATEMENT OF THE CASE

The Petitioner was charged by indictment with fifteen separate criminal offenses. Counts 3, 5, 7, 9 charged the Petitioner with income tax violations. The remaining counts charged him with narcotics violations, both conspiratorial and substantive.

Prior to trial, the Petitioner moved to sever the trial of the income tax counts from his trial on the other charges. His motion was denied (App. C).

The trial of this cause was lengthy, lasting from May 23, 1983 until June 7, 1983. During the course of trial, the Government introduced 170 different exhibits relating to the income tax counts as it sought to prove the Petitioner's guilt upon a "net worth" theory of proof. The Government's final exhibit, Exhibit #171, was its "Summary Chart". This chart was composed by Agent Monica whom the trial court *refused* to qualify as an expert witness. Over the Petitioner's strenuous objection, this "Summary Chart" was allowed into evidence. This "Summary Chart" was the Government's mere conclusion about what its version of the facts as to the Petitioner's assets were. This "Summary Chart" was incomplete as it omitted some of Petitioner's liabilities, loans to him, as well attributing assets to him, income rents, that had not been received. The "Summary Chart" was repeatedly referred to by the Government during closing argument. This "Summary Chart" was sent out with the jury for its deliberations.

The Petitioner was acquitted on *all* of the narcotics charges, both conspiratorial and substantive. The

Petitioner was convicted only on the income tax charges, Counts 3, 5, 7, 9.

The Petitioner was sentenced to a total of six years incarceration and a $30,000 fine.

The Petitioner's conviction was affirmed on direct appeal to the Eleventh Circuit Court of Appeals which appeal was pursuant to 28 U.S.C. §1291.

The Petitioner's timely Petition for Rehearing was denied.

REASONS FOR GRANTING THE WRIT

THE TRIAL COURT ERRED IN REFUSING TO SEVER THE TRIAL OF INCOME TAX COUNTS FROM THE NARCOTICS CHARGES.

THE TRIAL COURT ERRED IN ALLOWING THE GOVERNMENT'S "SUMMARY CHART", EXHIBIT 171, INTO EVIDENCE WHERE SUCH CHART WAS INACCURATE AND PRESENTED THE MERE OPINIONS OF THE GOVERNMENT AS TO THE EVIDENCE.

The Petitioner early attempted to sever the trial of the income tax counts from his trial on the narcotics charges. The prejudice inherent in trying any defendant on both such offenses, at the same time, especially in the Southern District of Florida, is apparent. The Petitioner's request for severance was denied and he was forced to go to trial and defend against both totally different allegations at the same time. The prejudice

suffered by this Petitioner is revealed by the Jury's verdict. He was acquitted of all drug offenses, but convicted of the income tax violations.

In the case of *United States v. Diaz-Munoz*, 632 F.2d 1330 (5th Cir. 1980), the defendants were tried, in a single trial, on charges of conspiracy to defraud, embezzlement, filing false documentation and mail fraud. The Circuit Court reversed the convictions finding that a severance of both counts and offenses should have been granted, stating:

> We find that there was a misjoinder as to both counts and defendants in this action as a matter of law and that the government's representation that the defendants and counts would be tied together led the trial judge to his erroneous holding that the requirements of Fed.R.Crim.P. 8(a) and (b) were satisfied. In alleging that these counts and defendants were connected, the government assumed the risk that its proof would fail, and it conceded this failure or oral argument. The record reflects clearly that the misjoinder was inherently prejudicial to the defendants,
>
> (p. 1335-1336).

Similarly, in this case, the Petitioner's Motion to Sever was denied on its representation that it could "link" the income tax and narcotics charges. App. C, p. 3. The Government failed, however, in proving the "link". The best the Government, by its own terms, could do was to prove that the drug violations were a "likely source of income" as to the income tax allegations.

(Government's Consolidated Response to Defendant's Motions, p. 55). The Government's failure to meet its burden of solidly tying all the counts together requires that the Petitioner's convictions be reversed.

In the recent case of *United States v. Wirsing*, 719 F.2d 859 (6th Cir. 1983), the defendant was jointly tried on one count of conspiracy to possess with intent to distribute marijuana and three counts of attempted income tax evasion. In *Wirsing*, Government contended, as it did here, that the unreported income was from the defendant's illegal drug activity. In reversing the defendant's convictions on the basis of misjoinder the Court stated:

> The court should have considered the complexity of the charges and the possible "spillover" effect from trying the different types of offenses in a joint trial.

(p. 865).

The trial court, in this case, should, too, have correctly gauged the "spillover effect" and severed the trial of these two vastly different types of offenses.

After it had introduced 170 exhibits, the sheer volume of which with reference to only the tax allegations should have required a severance, the Government successfully persuaded the trial court to allow Exhibit 171, its "Summary Chart" into evidence. Exhibit 171 was prepared by the government witness, Agent Monica, and, as could be expected, was favorable, if not conclusive, as to the Government's case. At the end of this Exhibit, the Government had thoughtfully even inserted its

own conclusions as to "Corrected Tax Liability", "Reported Tax Liability", and, most importantly "additional tax due".

Aside from being, rather than real evidence, one long (7 pages) Government argument and opinion, Exhibit 171 was inaccurate. It failed to reflect a loan to the Petitioner, and it included as income rents that had not yet been received.

In the case of *Steele v. United States*, 222 F.2d 628 (5th Cir. 1955) also a "net worth" income tax evasion case, the Court reversed the defendant's convictions finding it was error both to admit into evidence Government summary charts which were inaccurate and to allow the jury to consider such charts during its deliberations. In the instant case, also, both errors occurred.

In *United States v. Altruda*, 224 F.2d 935 (2d Cir. 1955), again, a defendant's income tax conviction was reversed when inaccurate government summary charts were allowed into evidence.

As in *Steele, supra*, and *Altruda, supra*, Exhibit 171 was improperly allowed into evidence and allowed to be considered, as substantive evidence by the Jury.

The joint trial of both the income tax counts and narcotics counts aggravated the error inherent in the introduction of Exhibit 171. Together, both these errors require reversal of this Petitioner's income tax convictions.

CONCLUSION

Based upon the above facts, arguments, and authorities, the Petitioner respectfully requests this Honorable Court to issue its most gracious Writ of Certiorari to review the instant opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

JOHN H. LIPINSKI, ESQ.
1441 N.W. North River Drive
Miami, Florida 33125
(305) 326-7143

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the United States Attorney, 155 South Miami Avenue, Miami, Florida 33130, and to the Office of the Solicitor General, Department of Justice, Washington, D.C. 20530, this day of June, 1984.

Appendix

APPENDIX A

[RECEIVED JUN 4 1984]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 83-5549

D.C. Docket No. 82-06067-CR-JLK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHESTER ZUKOWSKI, JR.,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

(April 9, 1984)

Before RONEY and JOHNSON, Circuit Judges, and MORGAN, Senior Circuit Judge.

PER CURIAM:

AFFIRMED. See Circuit Rule 25.

Judgment Entered: April 9, 1984
For the Court:
Spencer D. Mercer, Clerk
By: [Illegible]
Deputy Clerk

ISSUED AS MANDATE: MAY 24 1984

APPENDIX B

[FILED MAY 14 1984]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-5549

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHESTER ZUKOWSKI, JR.,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

ON PETITION FOR REHEARING

(May 14, 1984)

Before RONEY and JOHNSON, Circuit Judges, and MORGAN, Senior Circuit Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ [signature illegible]
United States Circuit Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 82-6067-Cr-JLK

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHESTER ZUKOWSKI
DONNA DIETZ ZUKOWSKI,

Defendants.

ORDER ON MOTIONS

This Cause came before the Court upon the motions of the defendants Chester Zukowski and Donna Dietz Zukowski and the Court having considered the motions and reviewed the file, it is thereupon

ORDERED AND ADJUDGED as follows:

1. The motion of Donna Dietz Zukowski to grant her motions for failure of the government to timely respond thereto is denied, as frivolous. The Local Rules of this Court do not require a response by the government to any defense motion, and no response was required by Court order in this case. Counsel is referred to Local Rule 10.G and H.

2. The motion of Donna Dietz Zukowski to sever her trial from that of Chester Zukowski, Jr., pursuant to *Fed.R.Crim.P.* 14 is denied. No sufficient factual basis is alleged for any of the several grounds for severance asserted in the motion. The allegations are conclusory and insufficient to justify evidentiary hearing.

3. The motion of Donna Dietz Zukowski to discover mail cover, obtain discovery relating to mail cover is granted only to the extent that the government shall disclose the existence of any mail cover of which the defendants were the subject during the investigation of this case.

4. The motion for a pretrial hearing on the existence of a conspiratorial agreement and the connection thereto of the defendant Donna Dietz Zukowski, as charged in the indictment is deferred to the District Judge.

5. The motion of Donna Dietz Zukowski for disclosure and production of confidential informers is denied, except as provided below, and except that the government shall disclose the name and record of prior convictions, if any, of any alleged informant who will testify for the government at trial, as well as any inducements provided or promised to such informants.

Public policy forbids disclosure of the identity of an informer except where it is essential to the defense. *Roviero v. United States*, 353 U.S. 53 (1957); *Scher v. United States*, 305 U.S. 251 (1938); *United States v. Toombs*, 497 F.2d 88 (5 Cir. 1974).

To compel disclosure of the identity of a confidential informer *the defendant must show* that such disclosure

is relevant to the defense of his case on the merits. This involves a factual showing with regard to two factors. The first is the degree of participation by the informant in the events charged, and the second is the directness of the relationship between the defendant's asserted defense and the probable testimony of the informant. Mere conjecture or supposition about the possible relevancy of the informant's testimony is insufficient to warrant disclosure. *United States v. Gonzales*, 606 F.2d 70 (5 Cir. 1979), and cases cited therein.

No adequate showing has been made in this case. The factual allegations of this motion are simply too general and conclusory to meet the requirements of the above cited cases. With regard to the witness Billy Skidmore no reason appears why he cannot be adequately interviewed at the prison where he is confined. With regard to the witness Gary Zebrowski who is named as a conspirator in the indictment, the government shall make him available for private interview by defense counsel at least two weeks prior to trial.

6. The motion of Donna Dietz Zukowski for government agents and attorneys to return rough notes and writings is granted to the extent that all such rough notes and writings shall be preserved and retained by the persons who made them.

7. The motion of Donna Dietz Zukowski to adopt motions of co-defendant and the motion of Chester Zukowski, Jr. to adopt motions of co-defendant are granted and the rulings entered on the specified motions shall be applicable to each defendant.

8. The motions of the defendants to strike surplusage from the indictment are denied without prejudice to their renewal at trial should no valid evidentiary purpose for inclusion of the language sought to be stricken become apparent.

9. The motion of the defendants to restrain the government from surveillance is denied. The allegations of this motion are purely speculative and have been denied by the government.

10. The motions of both defendants to sever the tax counts from the remaining counts are denied. *Fed.R.Crim.P.* 8(a) provides, *inter alia*, that two or more offenses may be charged in the same indictment if they are based on "two or more acts or transactions connected together or constituting parts of a common scheme or plan." The government contends that the alleged tax offenses were generated by the alleged drug offenses and were thus part of the common scheme or plan. Whether it can prove this claim must remain for trial. Further, no sufficient prejudice has been shown to justify severance pursuant to *Fed.R.Crim.P.* 14.

11. The motion of Chester and Donna Dietz Zukowski for bill of particulars is granted in part and denied in part, as follows: The government shall specify with as much particularity as possible the day, month and year the conspiracies alleged in counts one and two allegedly began and ended, and shall state as precisely as possible the date, time, and place of each of the overt acts alleged in count one and incorporated in count two. The government shall also disclose the identification numbers of the airplanes mentioned in these counts, if known. The government shall disclose

with as much specificity as possible the dates and places the events alleged in counts eleven through twenty six occurred. The government shall disclose the names of all known coconspirators not named in the indictment. With regard to counts three, four, five, and six, the government shall state what method of proof or combination of methods upon which it intends to rely at trial. If the net worth or net worth and expenditure method is designated, the government shall furnish the approximate opening and closing net worth attributed to the defendant for each year charged in the indictment. If the bank deposit method is designated the government shall furnish a statement of those facts which it intends to prove in support thereof. If the specific item method is designated, the government shall supply a statement of those items alleged to have been omitted from income. If a combination of one or more of the above mentioned methods of proof is designated, the government shall supply the details specified herein for each designated method. With regard to count twenty six, the government shall disclose the names of the five or more persons with respect to whom the defendant allegedly acted a organizer, supervisor, or manager. This motion is in all other respects denied.

12. The motion of Chester Zukowski, Jr. for production of grand jury testimony of certain witnesses is denied.

13. The motion of Chester Zukowski, Jr. for production of exculpatory material is granted as provided in the Standing Discovery Order previously entered herein and otherwise denied.

13. The motion of Chester Zukowski, Jr. for discovery and pretrial hearing on admissibility of absent coconspirators' statements is denied.

14. The motions of Donna Dietz Zukowski for witness list, for early production of Jencks Act material, for reserving the right to file additional motions are hereby denied.

15. The motion of Chester Zukowski, Jr. for Discovery is granted in part and denied in part, as follows: With regard to request No. 1, the government shall forthwith disclose whether it has witheld any items described in paragraph 1 of Exhibit A attached to this motion, and, if so, the rationale upon which such items have been witheld. Requests Nos. 2, 3, and 4, are denied, except as provided in the Standing Discovery Order. The government, of course, shall comply with *Brady v. Maryland*, 373 U.S. 83 (1963). Request No. 5 is granted only as to statements of the defendant, as provided by *Fed.R.Crim.P.* 16 and the Standing Discovery Order. Request No. 7 is granted only as to the prior criminal convictions of the defendants and any coconspirators, accomplices or informants who will testify for the government at trial. Request No. 8 is denied, except that the government shall disclose any violation of *Fed.R.Crim.P.* 6(d). Requests 9, 10, 11, and 12 are denied. Request No. 13 is granted to the extent that if a line-up or show-up was conducted, the government shall forthwith reveal that fact and the circumstances surrounding the procedure, and if a photograph or photographs of the defendant were shown to any witness who will testify for the government at trial, that fact shall be made known and all photographs displayed to the witness shall be shown to defense counsel prior to

testimony by the witness at trial. Request No. 14 is granted only to the extent that the government shall disclose the existence of search warrants and the Clerk's number assigned thereto, so that the defendant may obtain copies. Such warrants are indexed by number rather than alphabetically and this information is therefore necessary to the defendants. Arrest warrants issued in this case are in the case file. Request No. 15 is granted only as to material seized from the defendants or known by the government to belong to the defendants. Request No. 16 is granted only as provided in the Standing Discovery Order. Request No. 17 is denied. Requests Nos. 18 and 19 are granted to the extent provided in paragraph F. of the Standing Discovery Order and to the extent that the government shall disclose the existence of any mail cover of which the defendants were the subjects during investigation of this case. Requests Nos. 20-23 are granted only to the extent provided in the Standing Discovery Order.

DONE AND ORDERED in Miami, Florida this 19th day of August, 1982.

/s/ CHARLENE H. SORRENTINO
UNITED STATES MAGISTRATE

cc: United States Attorney
Diane Marger, Atty at Law
Edwin Marger, Esq.